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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 537

FASHION ORIGINATORS' GUILD OF AMERICA, INC.
ET AL.

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

The petitioners, Fashion Originators' Guild of America, Inc. et al.,¹ pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on August 24, 1940, modify-

¹The other petitioners too numerous to name herein are all those persons named in the decree of the Circuit Court of Appeals for the Second Circuit (R. 4685-4688, 4691-4693) with the exception of Austin M. DeLisser, E. W. Freudenburg, Samuel Levine, E. E. Meyer, National Federation of Textiles, Inc., Peter Van Horn and Irene L. Blunt. The petitioners, therefore, are the officers, members and affiliates of Fashion Originators' Guild of America, certain retail guilds and retailers cooperating with F.O.G.A. in its program to reduce style piracy.

ing and affirming an order of the Federal Trade Commission.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit is reported 114 F. (2d) 80 and is printed R. 4671-4679.

JURISDICTION

The decree of the Circuit Court of Appeals which the petitioners request this Court to review was entered August 24, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the collective refusal of manufacturers of garments of their own original designs to deal with retailers marketing unauthorized copies of their original designs is an "unfair method of competition" under Section 5 of the Federal Trade Commission Act, notwithstanding that the economic background of the program and its effect upon the industry and consumers show the restraint to be "reasonable".

2. Whether the systematic unauthorized copying of garments as originally designed by the petitioners is unfair competition against the evil effects of which the petitioners, without thereby violating Section 5 of the Federal Trade Commission Act, may protect themselves by collectively refus-

ing to deal with retailers so long as such retailers continue to market such unauthorized copies.

3. Whether the collective action of retailers in refusing to deal in unauthorized copies of petitioners' original creations is an "unfair method of competition" under Section 5 of the Federal Trade Commission Act, notwithstanding that the economic background of such action and its effect upon the industry, the retailer, and consumer, shows the restraint to be "reasonable".

STATUTE INVOLVED

The statute involved is Section 5 of the Federal Trade Commission Act, 38 Stat. 719, U.S.C. Title 15, Sec. 45. Its text in the Appendix, *infra*, pp.

STATEMENT

The petitioner, Fashion Originators' Guild of America, Inc. (hereinafter referred to as "F.O.G.A."), is a New York membership corporation whose membership was at one time composed of textile and ladies garment manufacturers (R. 108-121), but later was confined to ladies garment manufacturers. On April 16, 1936, the Federal Trade Commission issued its complaint against F.O.G.A., its members and certain cooperating retailers alleging them to be guilty of unfair methods of competition under Section 5 of the Federal Trade Commission Act (R. 3-25).

After hearings upon the complaint and answers, the Commission made the following findings pertinent to the question presented:²

F.O.G.A. was organized to protect the originators of ladies' garments of original design against "copying".³ (This is known in the trade as "style piracy".) (R. 122, fol. 365). To accomplish that end it embarked on a two-fold program. First, as the principal means of executing its purpose to suppress style piracy, F.O.G.A. persuaded retailers that they should subscribe to a declaration of policy by which they undertook to buy merchandise only upon a warranty that it was not a copy of an original creation of an F.O.G.A. member and to withdraw from sale and return to the manufacturer any merchandise adjudged by the "piracy committee" of F.O.G.A. (an independent body of retailers) to be such a copy (R. 124, fol. 370, 371). That was accomplished by threats that the dress manufacturer members of F.O.G.A. would not sell to retailers who refused to adopt that policy (R.

²The Federal Trade Commission made numerous other findings concerning trade practices which the petitioner sought to put into effect. For example, F.O.G.A. had sought to bring about uniform discounts for cash and to put an end to the practice of manufacturers' contributing to the retailers' advertising costs. The Commission ordered F.O.G.A. and its members to cease and desist from its efforts to enforce these and similar trade practices. The propriety of that part of the order does not raise the serious questions of public importance involved in the remainder of the F.O.G.A. program.

³"Copying" has a peculiar meaning in the garment industry. The second, third and successive dresses put out by the designing manufacturer are not copies but originals. A "copy" is an unauthorized reproduction made by another manufacturer. The word is used in that sense throughout this petition. Ladies' dresses, suits and coats are the garments here involved.

124-125, fol. 372-373). Such threats were carried out (*Ibid.*). Second, in a few cities, F.O.G.A. secured agreements from local retailers associations that members of such associations should follow the above-described policy and should also refuse to buy from F.O.G.A. members who dealt with local retailers marketing copies of F.O.G.A. designs (R. 123, fol. 368). Further to effectuate its purposes and to police the above system, F.O.G.A. adopted the following procedure: A design registration bureau was established at which F.O.G.A. members registered their designs (R. 125, 126, fol. 375, 376). "Shoppers" were employed to ascertain whether any retailer was selling what appeared to be a copy of a registered design (R. 126, 127, fol. 378, 379). If one was, the fact was reported to F.O.G.A. (*Ibid.*). The manufacturer of the copy was given an opportunity to appear before a "piracy committee" composed of experts who are retailers or buyers not members of F.O.G.A. (the decision of which was subject to appeal by him but not by the member to a second and similar committee). If he did, he was heard, but whether he did or not, the committee decided whether or not the garment complained of was in fact a copy of an original (not simply a registered) design before any action was taken (R. 126, fol. 377). If the committee decided the registered design to be original and the garment to be a copy, the retailer was notified and requested to remove it from sale and return it to the manufacturer. If he refused, the manufacturer members of F.O.G.A. refused to sell him garments. To give them the necessary information, a list of retailers selling pirated designs was maintained;

each new recalcitrant dealer was added to it (R. 127). "Retailers require the products of F.O.G.A. members to meet consumer demand and in 1936 the sales of members were a substantial proportion of the total (R. 121, 122, fol. 363, 364)."

The petitioners have not fixed or sought to fix prices, have not limited or tried to limit production, have not divided or sought to divide markets or caused or sought to cause deterioration of their products (R. 4367-4368). The Commission made no findings contrary to the undisputed testimony to this effect.

At the hearings before the Federal Trade Commission the petitioners did not deny the greater part of the above facts. They did deny that F.O.G.A. members held a dominating position in the industry but unless the decision below is to be defended on other grounds than the court adopted, that issue is now immaterial. The real defense offered was proof of the living background of the mechanical program described by the Commission (R. 4307-4327). Manufacturers in the industry are of two kinds. First are the manufacturers who adapt "styles" into original "designs". Second are the copyists who systematically live off the "designs" of originators. "Styles" are fixed by

"The Commission found that 38% of the sales in the wholesale price range of \$6.75 and up and 83.99% of the sales in the price range of \$10.75 and up were by F.O.G.A. members (R. 121, 122, fol. 363, 364). These figures, it is submitted, are inaccurate. For example, the evidence of the Commission shows that the figure 83.99% is a mathematical error and should be 63.99%. The court below accepted as the proper proportions 10% in the price range of \$6.75 and up and 42% in the price range of \$10.75 and up (R. 4671).

the fashion centers. There congregate designers sent by originators and they, after viewing the coming styles, interpret them into many "designs" according to their skill and taste. Without copying, the original design has value for about three months after the initial sale. But though it is free to all to adapt a style into any of the infinite number of possible designs, copyist manufacturers stand aside until the originators have developed designs. Then, gaining access to the designs by unfair and unlawful means if necessary, they meticulously copy the originals and sell the copies, thus obtaining the benefit of the investment and ability of others without cost to themselves. This piracy had devastating effects throughout the industry. The honest manufacturer lost the value of his creation. Sweat shops sprang up. Customers looking for originality were outraged to find that the market was flooded with copies of what they had thought was exclusive. Prices in many instances rose instead of fell for the originator and initial copyists were compelled to increase them to recapture the initial investment quickly and on what garments they could. Confidence in the retailer and therefore his business suffered; he lost his reputation for careful selection of originals and for charging prices commensurate with the individuality of the dress. The evil fed upon itself, producing slow disintegration of the industry. The F.O.G.A. program was designed to check it, not by tampering with prices or production, or by dividing markets, but simply by offering to retailers the choice of buying original designs of F.O.G.A. mem-

bers and selling no copies of them or of selling such copies and original designs of those not members. The period of protection was limited in practice to about three months. After that copies could be sold by anyone.

The Commission refused to hear this. It repeatedly ruled that the practices of F.O.G.A. could not be justified by any evidence of "what the necessity of the action [of F.O.G.A.] may have been" and excluded the proffered proof that the practices of F.O.G.A. were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils flowing from the pirating of original designs. (R. 4308, fol. 12922; R. 4307-4327.)

Upon the aforesaid findings the Commission entered, on February 8, 1939, an order directing the petitioner to cease and desist from the above-described practices. Thereafter the petitioners filed a petition in the Circuit Court of Appeals for the Second Circuit seeking review of the order of the Federal Trade Commission and to have it set aside (R. 1a-32a). On July 22, 1940, the decision of that court was rendered, and on August 24, 1940, the petition for review was denied (R. 4684-4694).

ASSIGNMENT OF ERRORS

The Circuit Court of Appeals erred:

1. In entering a decree affirming and enforcing with modifications the order of the Federal Trade Commission.
2. In ruling that the F.O.G.A. program was an unlawful boycott which might not be justified.

3. In ruling that the Federal Trade Commission did not err in excluding evidence of conditions in the garment industry before and after the adoption of the F.O.G.A. program, of the nature and effect of style piracy, of the reason for adopting the particular program and of the fact that the program was reasonable.

4. In ruling that a garment manufacturer is entitled as a matter of law to engage in systematic copying (as distinguished from isolated reproduction) of garments created and sold by manufacturers of garments of original design.

5. In ruling that the F.O.G.A. program was unlawful because each member manufacturer sought thereby to acquire a monopoly of each dress of his own original design.

6. In ruling that the F.O.G.A. program was unlawful because the combination might in the future fix prices or regulate production.

REASONS FOR GRANTING THE WRIT

1. *The decision below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in Wm. Filene's Sons Co. v. Fashion Originators' Guild of America*, 90 F. (2) 556. This conflict was expressly recognized by L. Hand, C. J., in the opinion of the court below.⁵ The Solicitor

⁵"In 1937 the First Circuit did indeed affirm a decree which dismissed a bill in equity brought against the Guild by a retailer. *Wm. Filene's Sons Co. v. Fashion Originators' Guild*, 90 Fed. (2), 556. We cannot find any distinction between the facts as there found and those which we feel bound to take as though proved, and it follows from what we have already said that we are unwillingly forced to a different conclusion."

General also recognized the conflict in his reply to the petition for certiorari in *Millinery Creators' Guild, Inc. v. Federal Trade Commission*, No. 251, October Term, 1940. Certiorari was granted in the *Millinery* case on October 14, 1940.

2. *This case presents an important question of Federal Law which has not been but should be decided by this Court.* The Commission proceeded upon the theory that F.O.G.A. was an unlawful combination *per se* because the combination involved a concerted refusal to deal. It refused to receive evidence of conditions in the industry before and after the cooperative effort was undertaken, of the nature and effect of the evil of "style piracy", of the destruction of the interests of manufacturer and laborer and retailer and consumer, of the reasonableness of the means adopted and of the ultimate results upon prices and competition (R. 4307-4327). The court below agreed. F.O.G.A. members have no "property" in their designs, it said; the combination is a boycott to exclude copyists from the market; it cannot be justified by proof that it benefits the remaining manufacturers and consumers as well; it aims at a monopoly in each original dress and so is unlawful. In so condemning the F.O.G.A. program, both Commission and Court hewed a new path away from established principles and practice. Barring cases involving attempts to regulate prices or production or to divide markets, this Court has uniformly pointed out that an industry's voluntary cooperative effort must be judged in the light of the facts peculiar to

the industry, the conditions before and after the restraint was imposed, the evil believed to exist and the reason for adopting the particular remedy. *Board of Trade of The City of Chicago v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344; *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 597-598.

There is also raised a serious question in regard to the significance of *International News Service Co. v. Associated Press*, 248 U. S. 215. The scope of that decision has not been delimited by this Court but since the systematic deceptive copying of dresses of original design is the same kind of conduct as the systematic copying of papers spreading recent news we submit that the court probably was wrong in not following that decision. Cf. *Callman, Style and Design Piracy*, 22 J. of Pat. Off. Soc. 578, 586.

The public importance of these questions is obvious. The ladies garment industry is a major industry. To it their final determination has vital significance. Cf. *Paul H. Nystrom, Fashion Merchandizing, The Ronald Press* (1932), Chapter 14.

3. *The present case should receive full consideration by the Court notwithstanding that a writ of certiorari has been granted in Millinery Creators Guild v. Federal Trade Commission.* Although the two cases are somewhat analogous the records differ sharply. The *Millinery* case was decided principally upon a stipulation of facts. No evidence was offered to show in justification of the boycott that the program was reasonable or what had been con-

ditions in the industry before and after the program was adopted, what evils had existed and why the particular remedy was adopted. In the instant case the petitioners urged that the principle recognized in *Appalachian Coals, Inc. v. United States*, *supra*, was as applicable to a concerted refusal to deal as to other restraints not regulating prices, production or quality and they did offer to prove in great detail the effect upon the industry of style piracy and of the cooperative effort to eliminate it. This case, therefore, does raise a fundamental question which may not be raised by the *Millinery* case—whether a boycott can be justified by proof that it benefits the consumer and the industry as a whole.

The conflict between the First and Second Circuit Courts of Appeals which is the chief reason for asking this Court to review either this or the *Millinery* case springs from and is best shown by the conflicting decisions upon the legality of the F.O.G.A. program (*Cf. Reply to Petition for Certiorari, Millinery Creators Guild v. Federal Trade Commission*, No. 251, October Term 1940). The identical program was held lawful in one case and unlawful in the other. Evidence in justification was considered and held sufficient in the First Circuit. The same evidence was offered in this case but was excluded as immaterial. In the *Millinery* case, however, the record contains no such evidence or offer of proof.

Moreover, the program of the Millinery Guild differed from that of F.O.G.A. For example, the Millinery Guild did regulate prices. The Federal

Trade Commission so found.⁶ F.O.G.A. did not regulate prices directly or indirectly. The Federal Trade Commission did not find that it did. The court below accepted the uncontradicted evidence of this fact.⁷ This difference in the programs and the differences in the records upon which the cases arise make it peculiarly advisable, we submit, that this Court when it resolves the conflict between the circuits should consider in addition to the *Millinery* case the very program which occasioned the conflict.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted and the case set down for argument immediately following *Millinery Guild, Inc. v. Federal Trade Commission*, No. 251, October Term, 1940.

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MELVIN A. ALBERT

October 1940.

⁶"The . . . result of the said . . . practices have been and now are . . . to creat monopoly in the sale of women's hats . . .

(b) By depriving the public of the benefits of price competition among retailers . . .

(d) By increasing the price of stylish hats for women. . . ."

⁷"The case at bar is not one of price fixing . . ." (R. 4677).

APPENDIX

Statute Involved

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by Act of June 23, 1938, c. 601, § 1107(f), 52 Stat. 1028, U. S. C. Title 15, Sec. 45 provides as follows:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

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